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No. 99-1430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

ALEXANDER G. LUNNEY, an infant, by his father and natural guardian, J. ROBERT LUNNEY,
Petitioner,

v.

PRODIGY SERVICES COMPANY
(a partnership of Sears, Roebuck & Co. and International Business Machines Corp.),
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Petitioner, Alexander G. Lunney, respectfully submits that Respondent has made two new points in its BRIEF IN OPPOSITION to which Petitioner should respond.

The first is that Respondent asserts that, not only did it have no knowledge or participation in the allegedly tortious acts, but that it took steps to rectify whatever it could concerning the wrongdoings complained of by Petitioner Alexander Lunney and his father.

The second is that the New York courts below dismissed the suit solely on state common law grounds and that Petitioner's argument below that the CDA's Good Samaritan immunity provision should not preclude his claims is inconsistent with the instant Petition claiming that the state courts below reached their decision in contravention to federal law, despite their denials.

I

Though the parties to a suit are entitled to their respective allegations against and denials of each other's factual assertions, the resolution of factual claims is not necessary to a disposition of the legal and constitutional issues herein. Even if Respondent had acted as a well meaning actor that took all steps it could to rectify the alleged wrongdoing, that would be irrelevant to the instant conflict of laws issues submitted in the Petition. Though Petitioner disputes Respondent's claims that the summary of facts in the Petition is inaccurate,[1] the relevant issue is

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[1] As stated in the Petition, at 6: "Petitioner offered to prove that Prodigy did have knowledge of those statements and did know those statements were in fact false and continued to allow the false statements to be published." Petitioner would submit that Respondent did not rectify the harm, because it did not inform

the factual basis upon which the state courts below based their decision. In this regard, both appellate courts assumed from the pre-trial record that, even taking the messages as defamatory, no liability could be attached because those courts created a common carrier immunity for a non-carrier interactive computer service.

As stated in the Petition, at 5:

> The Appellate Division's rule of law, later adopted by the Court of Appeals, expands the traditional common law principles of carrier liability into one of absolute immunity for "internet service providers" ("ISPs"), holding, *id.* at 233 (App. 17): "Assuming that such a statement could indeed be defamatory, we conclude that Prodigy cannot be held legally responsible for it, nor for the allegedly defamatory bulletin board postings . . . ."

As stated in the Petition, at 6:

> The Court of Appeals assumed defamation (App. 4): "For purposes of this opinion, we will assume that although he was not directly attacked, Lunney was defamed by being portrayed as the author of the foul material."

Therefore, regardless of how the parties characterize the facts, the courts below held that even an otherwise actionable claim would be precluded by its grant of carrier immunity to Respondent in any event.

II

Petitioner also submits that the New York courts below ruled squarely against the express mandate of the

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recipients of the messages that Petitioner did not send them and Respondent asserted positively to its employees that Petitioner was a perpetrator of credit card fraud and obscene threats.

federal limits of non-carrier immunity for interactive computer services as codified in the CDA title of the Telecommunications Act of 1996 and that the unavoidable federal question was preserved in the State courts below.

As stated in the Petition, at 6:

> The Appellate Division also relied upon the CDA in that it held that the court's "application of the common-law qualified privilege recognized in *Anderson* also renders the outcome in this case in complete harmony with current Federal statutory law contained in the Communications Decency Act of 1996 (47 U.S.C. §230)."

As further stated in the Petition, at 23:

> Petitioner also submits that this issue is viable, despite the declaration of the New York Court of Appeals that it was not ruling on the scope of CDA's "Good Samaritan" immunity, 94 N.Y.2d 242, Slip Op. at 10 (App. 9-10). The Appellate Division specifically ruled on this issue by stating that its decision was in "complete harmony" with the CDA, 250 A.D.2d at 238 (App. 25). Both courts below incorrectly characterized their opinions.
>
> The Court of Appeals' ruling is based solely on treating a non-carrier as if it were a telephone or telegraph carrier-a decision directly contrary to the Congressional mandate that nothing in the CDA (47 U.S.C. § 223) "shall be construed to treat interactive computer services as common carriers or telecommunications carriers." This is not a matter of state law, it is a matter of interstate commerce. The immunity the state court purported to grant was reserved for regulated carriers, so the conflict with the Commerce Clause cannot be avoided.

The central issue presented herein is that the highest court of a State has extended absolute carrier immunity to a non-common carrier that provides commercial online services through the Internet in a fashion that directly contradicts the scope of conditional immunity that Congress mandated in 47 U.S.C. § 230 (c) for such non-regulated carriers that provide interactive computer services over facilities of interstate and foreign commerce such as the Internet and phone system.

As stated in the Petition, at 20-21:

> The CDA's Good Samaritan provision did not grant unconditional-absolute immunity, but allowed for conditional-earned immunity if the statutory requirements are met. The state court below purported to extend to Prodigy, as an interactive computer service provider, a type of immunity heretofor reserved for common carriers, but granted a more absolute immunity than the qualified privilege applicable to such carriers.
>
> The immunity due a telephone or telegraph company is one based on its status as a common carrier that affects interstate or foreign commerce to the extent that Congress has chosen to regulate it for the public good under the Commerce Clause. Congress enacted the Communications Act of 1934 and established the Federal Communications Commission to regulate the Nation's communications carriers. The unearned and unconditional extension of carrier immunity by the New York courts is in direct contravention to and conflicts with the CDA's express amendments to the Communications Act that interactive computer services, such as online service providers like Prodigy, are not and shall not be treated as common carriers.

Finally, Petitioner submits that his arguments below are fully consistent with his Petition in this Court.

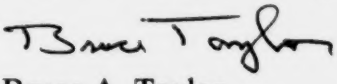
As stated in the Petition, at 21-23:

> Although the Petitioner argued that the Good Samaritan provision of the CDA was inapplicable to his claims because both the acts (1993-94) and the filing of the suit (1994) predated the passage of the CDA (1996), the New York courts were in error in finding their adoption of carrier immunity to be consistent with the CDA (as the Appellate Division held) or that the CDA was irrelevant to the application of the carrier immunity (as the Court of Appeals held). . . . The relevance of the non-carrier treatment for ICSs in the CDA is totally consistent with Petitioner's argument that the CDA's immunity provisions do not govern his liability claims against such a non-carrier. However, the state courts' treatment of non-carrier Prodigy as if it were a telephone carrier, for liability purposes, and then extending a much broader type of carrier immunity than the CDA intended for such non-carrier services, is not consistent with the enactments of Congress and should be reversed as in conflict with the Supremacy, Commerce, Obligation of Contracts, Due Process, and Equal Protection clauses.

CONCLUSION

For these and the reasons stated in the Petition, Petitioner submits that the writ should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Three copies of this REPLY BRIEF OF PETITIONER were served upon counsel for Respondent on this 24th day of April, 2000, by placing them in the U.S. Mail, first-class postage prepaid, addressed to:

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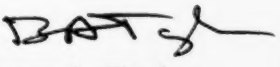
All parties required to be served have been served.



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